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Supreme Court, U.S.
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No. 02-1722

IN THE

Supreme Court of the United States

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 1445,

Petitioners,

v.

POLAND SPRING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Supreme Court grant certiorari to review the determination by the United States Court of Appeals for the First Circuit that an arbitration award was properly vacated because it ignored the plain language of the applicable contract?

STATEMENT PURSUANT TO RULE 29.6

Respondent's parent corporations and the publicly held companies holding 10% or more of its stock are:

Nestlé Waters North America Inc.

Perrier Vittel S.A.

Nestlé S.A.

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STATEMENT OF THE CASE

The Parties

At all times relevant to this matter, Respondent, Poland Spring Corporation ("Poland Spring" or the "Company"), bottled and distributed spring water at its facility in Poland Spring, Maine. (Pet. App., 1a). Petitioner, United Food and Commercial Workers International Union, AFL-CIO-CLC, Local 1445 (the "Union"), was the exclusive bargaining agent for certain classifications of the Company's employees at that facility. (Pet. App., 26a). The parties entered into a collective bargaining agreement (the "Contract") that, by its terms, governed their relationship from January 1, 1997 to December 31, 2001.[1] (Pet. App., 49a-54a). Leo Beaupre (the "Grievant") was one of the employees represented by the Union. When Mr. Beaupre was discharged by Poland Spring, the Union submitted his resulting grievance to arbitration before Arbitrator Philip Dunn ("Arbitrator Dunn" or the "Arbitrator"). (Pet. App., 3a-4a, 32a).

The Grievant's Discharge

The Grievant was suspended and ultimately terminated from his position as a palletizer operator as a result of an incident that occurred on the night shift that began on February 5, 2000 and ended early in the morning on February 6. A palletizer is a machine that loads case lots of bottles onto pallets and wraps the full pallets in plastic for shipping. The Grievant's job in operating that equipment included

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1. The Contract in effect during the events at issue in this matter expired by its terms on December 31, 2001. A new agreement has since been negotiated by the parties.

placing empty pallets on the machine and removing loaded pallets from it. (Pet. App., 1a-2a). The Arbitrator found that all bargaining unit employees of Poland Spring, including the Grievant, share responsibility for keeping the plant clean. For the Grievant, that responsibility included cleaning scrap bottles or other litter from under his machine, which was elevated on legs above the floor. (Pet. App., 33a).

During the night shift beginning February 5, the Grievant's assigned production line was temporarily down. The Grievant was initially reassigned by his supervisor, Mike Arsenault, to help clean the filler room. When the Grievant explained that his medical condition prevented him from working in that room, Mr. Arsenault withdrew the assignment. Instead, Mr. Arsenault directed the Grievant to clean bottles out from under a raised platform called an accumulation table. (Pet. App., 34a-35a).

The Arbitrator found that the Grievant refused to perform the new assignment. Mr. Arsenault repeated his instruction to clean under the accumulation table, and the Grievant again refused. After the second refusal, Mr. Arsenault warned the Grievant that his non-compliance would constitute an act of insubordination that could result in termination. When he again refused to perform the work assignment, Mr. Arsenault directed the Grievant to accompany him to a conference room. (Pet. App., 36a).

The Grievant testified that, on the way to the conference room, he asked Mr. Arsenault "if he was the man that was going to take the grievant's job over a bottle of water, and if he did, would that make him feel like a man." As a result of that comment, the Arbitrator found: "Certainly, then, the grievant at least by that point understood that he could face

termination for failing to comply with Arsenault's directive." Nevertheless, the Grievant continued to refuse to perform the assignment. (Pet. App., 36a-37a).

Mr. Arsenault and another supervisor met with the Grievant in the conference room, and the Grievant was warned that, if he continued to refuse to perform the task assigned to him, he could be suspended pending investigation of grounds for termination. The Grievant continued to refuse to perform the assignment and, as he had been warned, was suspended and sent home. Ultimately, the suspension was converted to a termination of employment. (Pet. App., 37a-39a).

The Contract Between the Parties

The Contract specifically reserves to Poland Spring the right to terminate its employees for just cause. Article 9 is entitled "Management Rights" and provides in relevant part:

> Management of the operations and the direction of the workforce, including but not limited to . . . the right to . . . discharge for just cause . . . shall be solely and exclusively vested in the Company subject only to limitations as are expressly provided for in this Agreement. . . .

(Resp. App., 2a).

Article 32 is entitled "Discipline and Discharge" and sets forth the parties' agreement that insubordination constitutes just cause for termination. The language in that Article states that a number of categories of employee misconduct may

warrant a lower level of discipline prior to discharge. Insubordination, however, is not such an offense. Article 32 provides in relevant part:

> Discipline and discharge shall only occur for just cause. The parties agree that just cause for discharge shall include, but not be limited to, the following:
>
> . . .
>
> 8. Insubordination;
>
> . . .
>
> It is anticipated that prior to discharge, employees would first be given a warning with regard to items 10, 11, 12, 14, and 17, and that a warning may or may not also be appropriate prior to discharge with regard to items 2 and 16. . . .

(Pet. App., 50a-51a).

Finally, in Article 33, "Grievances and Arbitration," the parties agreed to submit differences as to the Contract's meaning or application to a grievance procedure ultimately leading to arbitration. As part of that agreement, however, they explicitly limited an arbitrator's authority. Article 33 provides in relevant part:

> . . . . The arbitrator shall have no power to alter or modify any of the terms of this Agreement or to impose on any party a limitation or obligation not explicitly provided for in this Agreement. . . .

(Pet. App., 54a).

The Opinion and Award

After considering all of the evidence submitted by both Poland Spring and the Union at a hearing held on December 19, 2000, Arbitrator Dunn issued an award (the "Award") in which he found that the Grievant repeatedly refused to perform a task that was within his job responsibilities. He also found that the Grievant was aware that he risked termination by failing to comply with his supervisor's instructions. The Arbitrator concluded that "[t]here is little doubt in this case that absent some persuasive affirmative defense, the grievant was guilty of the offense of insubordination." (Pet. App., 40a-41a).

The Arbitrator then considered and rejected the Union's two proffered affirmative defenses. First, the Union argued that the Grievant's health or safety would have been compromised if he had complied with Mr. Arsenault's directive to clean under the accumulation table. The Arbitrator rejected that defense, finding that the Union failed to prove that the Grievant's refusal was motivated by a sincerely held, reasonable health or safety concern. (Pet. App., 41a-45a).

Arbitrator Dunn also rejected the Union's second defense that the Grievant reasonably believed he would have been subjected to humiliation, embarrassment, or sexual assault if he had bent over to clean under the accumulation table. That defense was based on banter of a sexual nature that occurred earlier in the evening between the Grievant's co-workers and his supervisor. Arbitrator Dunn described the interaction as "a bunch of guys . . . simply ribbing the new supervisor, and the new supervisor (unwisely) trying to play along to show he was still a good guy." The Arbitrator found

that the Grievant knew that the banter was not serious and that "[t]here was not in that ribbing the slightest, serious implication that Arsenault in fact had any homosexual inclinations, or the inclination to act on them in any way on the shop floor." As a result, Arbitrator Dunn concluded that the Grievant had "no reasonable basis" for believing that he was at risk of assault if he complied with his supervisor's directions or for believing that his supervisor "had any prurient interest in checking out the grievant's behind by having him bend over to clean under the accumulation table." (Pet. App., 45a).

Having rejected the Union's affirmative defenses for the Grievant's insubordination, the Arbitrator declared: "That leaves one remaining issue for discussion, that being the level of discipline imposed." On that issue, the Arbitrator acknowledged Poland Spring's argument:

> The Company asserts that Article 32 of the labor agreement clearly and unambiguously states that when an employee commits an act of insubordination, that by definition constitutes just cause for termination. Accordingly, the Company concludes, the arbitrator lacks the authority to reduce a termination to a lesser level of discipline, once the offense of insubordination has been proven.

(Pet. App., 46a).

After reviewing Article 32 of the Contract, however, Arbitrator Dunn rejected Poland Spring's contention:

> [Article 32] may well establish that in clear, straight-forward cases of insubordination, without

> mitigating considerations, the parties by agreement have established the per se rule that there is just cause for termination. However, the language of Article 32 does not state that even in the presence of mitigating circumstances, insubordination still will necessarily provide the Company with just cause for termination.

(Pet. App., 46a-47a).

The Arbitrator then explained his view that "where significant, mitigating considerations are present, the culpability of the employee may be diminished, and summary termination may no longer be justified." Under that standard, he considered Mr. Arsenault's "improper fraternizing with production workers, including the grievant," finding that it "created an environment where one of the employees might think, at least initially, that Arsenault was not acting in his supervisory capacity." As a result, the Arbitrator concluded:

> Given that confusing environment which Arsenault's actions created, at the very commencement of the February 5 incident, it was unjust for the Company to terminate the grievant for his insubordinate behavior which immediately followed. However, given that the grievant's insubordinate behavior then extended over a lengthy period of time, even after repeated warnings from two supervisors, a two week suspension without pay would have been justified.

(Pet. App., 47a-48a).

The District Court Action

Arguing that Arbitrator Dunn exceeded his contractual authority in purporting to reinstate the Grievant, Poland Spring filed an action in the district court seeking to vacate his Award. The Union counterclaimed seeking enforcement. Both parties moved for summary judgment, and the District Court found in Poland Spring's favor. (Pet. App., 26a-28a).

The district court found that, under the Contract, "insubordination is explicitly made just cause for discharge" and that, "[u]nlike some other bases for discharge, there is no requirement of prior warning in cases of insubordination." Holding that "the arbitrator found explicitly that [the Grievant] was guilty of insubordination," the court concluded that "the arbitrator exceeded his powers in ordering the reinstatement of the insubordinate employee." (Pet. App., 26a-28a).

Appeal to the First Circuit

Petitioner appealed the district court's order granting summary judgment to Poland Spring. The panel majority agreed with the Union that "'insubordination' is not defined in the contract nor is it self-defining." As a result, the Arbitrator "could permissibly have read the contract to mean that some acts of disobedience constitute 'insubordination within the meaning of the contract and that other, less severe acts – although literally disobedience – do not." (Pet. App., 16a-17a). However, the panel majority also agreed with the court below, finding that the Arbitrator had in this case deemed the Grievant guilty of insubordination under the Contract. (Pet. App., 14a).

Having done so, the court explained, the Arbitrator was "barred from further inquiry because such additional probing constituted ignoring the plain language of the contract." Although the meaning of the term "insubordination" under the Contract is ambiguous and subject to interpretation, the court found that the plain language of the Contract provides that insubordination, once found, is always just cause for termination. (Pet. App., 10a-12a). As a result, because the Arbitrator had found insubordination, the Award ordering reinstatement of the insubordinate Grievant was unenforceable. (Pet. App., 15a).

Petitioner's motions for rehearing by the First Circuit panel and for rehearing en banc were denied. (Pet. App., 29a).

REASONS FOR DENYING THE PETITION

I. The First Circuit's Decision Vacating an Award that Disregards the Plain Language of the Contract does not Contradict any Decision of this Court Limiting Judicial Review of Arbitration Awards.

As Petitioner emphasizes, under this Court's holding in such cases as *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), and *United Steelworkers of America v. Enterprise Wheel & Car*, 363 U.S. 593, 597 (1960), judicial review of an arbitration award is narrow and deferential to the arbitrator. A court may not reconsider the merits of an award and may not second-guess an arbitrator's findings of fact or interpretation of a contract. *Misco*, 484 U.S. at 36. However, even under that deferential standard of review, an arbitrator's discretion in settling labor disputes is not altogether unlimited. Instead, an arbitrator's authority "is confined to interpretation and application of

the collective bargaining agreement." *Enterprise Wheel & Car*, 363 U.S. at 597. As a result, this Court has repeatedly emphasized that an arbitrator "may not ignore the plain language of the contract," and an arbitration award "cannot simply reflect the arbitrator's own notions of industrial justice." *E.g.*, *Misco*, 484 U.S. at 38; *E. Assoc. Coal Corp. v. UMW, Dist. 17*, 531 U.S. 57, 62 (2000); *Enter. Wheel & Car*, 363 U.S. at 597. An "award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Enter. Wheel & Car*, 363 U.S. at 597. "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id.*

Petitioner argues that the First Circuit contradicts this Court's decisions limiting review of an arbitration award by itself reviewing the language of the Contract to determine whether that language permitted Arbitrator Dunn's interpretation. In making that argument, Petitioner suggests that only an arbitrator, and not a court, is allowed to analyze contract language. That argument is illogical. In order to determine whether an award "ignore[s] the plain language of the contract" or "draws its essence from the collective bargaining agreement," the First Circuit had to review and analyze the Contract language at issue. Although a court may not vacate an award simply because it disagrees with an arbitrator's interpretation, it may not enforce an award that deviates from the plain language of the applicable contract. *Enter. Wheel & Car*, 363 U.S. at 597. Thus, this Court's decisions did not prohibit, but in fact required, the First Circuit to review the Contract language at issue and determine whether it permitted the Arbitrator's interpretation.

Petitioner also makes the illogical argument that the First Circuit's approach to reviewing an arbitration award

exceeds the court's authority to determine only whether an award rests on the arbitrator's interpretation of a contract. In the approach articulated by the First Circuit, the court first determines whether the language at issue is fairly susceptible to differing meanings. Where the language is not susceptible to differing meanings, the court holds that the arbitrator lacks discretion to interpret it. That approach is simply another way of articulating this Court's prohibition against enforcing an award that deviates from the plain language of an agreement. As a result, decisions stating and applying the First Circuit's approach to reviewing arbitration awards do not conflict with any of the decisions of this Court on the subject.

Furthermore, Petitioner confuses the issues and misrepresents the opinion below in its efforts to demonstrate that the First Circuit overstepped its bounds in reviewing the Award in the instant case. Petitioner argues that the First Circuit engaged in impermissible contract interpretation and infringed on the Arbitrator's exclusive authority when it held that the plain language of the Contract did not allow the Arbitrator to engage in further scrutiny once he found that the Grievant was guilty of insubordination. In support of that argument, Petitioner asserts that the First Circuit's own opinion demonstrates that the language at issue does not have the clear and plain meaning assigned to it by that court in overturning the Arbitrator's Award. In making that assertion, however, Petitioner confuses the court's discussion concerning the definition of "insubordination" under the Contract with the court's holding regarding the appropriate discipline for that offense.

Petitioner correctly notes that the First Circuit held that the plain language of the Contract provides that

insubordination is just cause for termination, prohibiting the Arbitrator from relying on mitigating circumstances to substitute a lesser degree of discipline once he found that the Grievant was insubordinate. Petitioner incorrectly argues, however, that the majority opinion "recognized . . . that 'minor' or 'trivial' instances of insubordination would not constitute 'just cause' for discharge." To the contrary, the majority found that, while the plain language of the Contract establishes that insubordination is always just cause for termination, "the term insubordination is not defined in the agreement and is obviously susceptible to multiple interpretations." (Pet. App., 14a). As a result, "the arbitrator could permissibly have read the contract to mean that some acts of disobedience constitute 'insubordination' within the meaning of the contract and that other, less severe acts – although literally disobedience – do not." (Pet. App., 17a). Simply stated, under the First Circuit's analysis, it was up to the Arbitrator to determine whether Grievant's conduct constituted insubordination or was instead one of those "minor or trivial" acts of disobedience that did not rise to the level of insubordination. But once he found that it was insubordination, the Contract dictated that it was just cause for termination. There is no conflict in the First Circuit's holding that the term insubordination is ambiguous and subject to the Arbitrator's interpretation while the Contract provision concerning the appropriate discipline for insubordination is not. Nor, as Petitioner claims, does the ambiguity in one provision undermine the plain meaning of the other.

Likewise, Petitioner misstates First Circuit case law by arguing that the Circuit mandates literal interpretation of contract language and prohibits an arbitrator from finding implied terms. Petitioner has not cited a single instance in

which the First Circuit has so held. Moreover, the First Circuit does not apply a purely literal approach to reviewing the language of an agreement. Instead, the language of an agreement is "taken in context and with due regard for the surrounding circumstances." *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 845 (1st Cir. 1997).[2]

Finally, it is Petitioner, and not the First Circuit, who advocates an approach that is contrary to this Court's precedent. Petitioner seeks to prohibit courts from conducting any analysis of the relevant contract language during the process of reviewing arbitration awards. Under the Petitioner's approach, an arbitrator would merely have to discuss the language of a contract in his or her award to survive judicial review, even if his or her ultimate decision contradicted the intention of the parties as clearly expressed in the agreement. This Court's precedent supports no such outcome. Instead, the Court holds that an arbitrator's authority is limited to interpreting and applying the collective bargaining agreement. *E.g.*, *Major League Baseball Players Ass'n. v. Garvey*, 532 U.S. 504, 509 (2001). While an

2. Petitioner cannot argue that the First Circuit impermissibly prohibited the Arbitrator from finding an implied term in the present case. "Inferring an implied condition must be distinguished from creating one." *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 186 (7th Cir. 1985). As demonstrated more fully below, when he reinstated the Grievant, Arbitrator Dunn created a new limitation on the Company's right to discharge its employees that contradicts the Agreement's express language. Moreover, unlike the contract at issue in *Ethyl*, the Contract in the present case prohibited the Arbitrator from imposing on the Company any limitations not *expressly* provided in the Contract. Thus, although the First Circuit does not generally prohibit arbitrators from finding terms that are merely implied in a contract, the Contract at issue here precluded Arbitrator Dunn from finding any implied provisions.

arbitrator has considerable discretion in carrying out that function, this Court has long recognized that it is the courts' responsibility to ensure that he does not "ignore the plain language of the Contract" or "dispense his own brand of industrial justice." *E.g.*, *Misco*, 484 U.S. at 38; *United Steelworkers of Am. v. Enter. Wheel & Car*, 363 U.S. 593, 597 (1960). The First Circuit's approach in this and similar cases merely carries out that mandate.

II. The First Circuit's Interpretation of the Award and Application of this Court's Properly Stated Rules Concerning Judicial Review do not Warrant Certiorari.

Petitioner argues that certiorari is appropriate in this case because the First Circuit erred when it held that the Arbitrator ignored the plain language of the Contract. That holding was based on the court's factual determination that the Arbitrator found the Grievant insubordinate yet mitigated the discipline for that conduct, disagreeing with the Union's argument that the Arbitrator did not find insubordination. Having made that factual determination, the court then applied this Court's rule requiring arbitration awards to draw their essence from the Contract. Even if the First Circuit's holding was incorrect, erroneous factual findings and misapplication of a properly stated rule of law are rarely grounds for a writ of certiorari. Sup. Ct. Rule 10. Moreover, nothing about this case provides an exception to the rule. To the contrary, the Award demonstrates that both the First Circuit and the district court below were correct in concluding that the Award fails to draw its essence from the Contract.

In an effort to link the Arbitrator's decision to the text of the collective bargaining agreement, Petitioner notes the

Arbitrator's reference to the language of Article 32. However, an arbitrator cannot shield from judicial correction an impermissible disposition of a grievance "simply by making the right noises – noises of contract interpretation." *Ethyl Corp. v. United Steel Workers of Am.*, 768 F.2d 180, 187 (7th Cir. 1985). The decision at issue here qualifies as such an impermissible disposition because it altogether departs from the essence of the Contract.

An arbitration award fails to draw its essence from an agreement when it: (1) conflicts with express terms of the agreement; (2) imposes additional requirements not expressly provided in the agreement; (3) is without rational support or cannot be rationally derived from the terms of the agreement; or (4) is based on general considerations of fairness and equity instead of the precise terms of the agreement. *Wyandot v. Local 227, UFCW*, 205 F.3d 922, 292 (6th Cir. 2000). The Award in this case deviates from the essence of the Contract in each of those four ways.

Upon finding that the Grievant had been insubordinate, the Arbitrator substituted his own brand of industrial justice for the Contract's agreed-upon discipline for that conduct. He did so by creating a mitigating circumstances exception to the parties' agreement that insubordination constitutes just cause for termination. Recognizing that Article 32 allows termination for insubordination, the Arbitrator noted that it "does not state that even in the presence of mitigating circumstances, insubordination still will necessarily provide the Company with just cause for termination." (Pet. App., 47a). The Arbitrator was, of course, correct. Article 32 does not include that language. Nor does it state that "insubordination will be just cause for termination in the *absence* of mitigating circumstances." It provides that

"just cause for discharge shall include . . . insubordination" – period. The Arbitrator in effect added "in the absence of mitigating circumstances" to that provision. Holding that when mitigating circumstances are present, "the culpability of the employee may be diminished, and summary termination may no longer be justified," he concluded that "it was unjust for the Company to terminate the grievant for his insubordinate behavior." (Pet. App., 47a-48a).

That conclusion by the Arbitrator conflicts with the express terms of the Contract. Under Article 32, insubordination is *per se* just cause for termination, giving the Company the absolute right to discharge the Grievant for his insubordinate behavior:

> Discipline and discharge shall only occur for just cause. The parties agree that just cause for discharge shall include, but not be limited to, the following:
>
> . . .
>
> 8. Insubordination;
>
> . . .

(Pet. App., 50a-51a). Although the parties agreed in Article 32 that some categories of employee misconduct may warrant a lower level of discipline prior to discharge, they expressly excluded insubordination (item 8) from that list:

> It is anticipated that prior to discharge, employees would first be given a warning with regard to items 10, 11, 12, 14, and 17, and that a

> warning may or may not also be appropriate prior to discharge with regard to items 2 and 16. . . .

(Pet. App., 51a). Thus, by concluding that the Grievant's insubordination was not just cause for his termination, the Award conflicts with the express terms of the Contract. Accordingly, it fails to draw its essence from the Contract.

Likewise, the Award imposes additional requirements not expressly provided in the Contract. To discharge an employee, the Arbitrator required "insubordination in the absence of mitigating circumstances." The Contract, however, requires only "insubordination," and nothing else. Thus, the Arbitrator exceeded his authority by imposing an additional limitation on Poland Spring's right to terminate its employees, and the Award does not draw its essence from the Contract.

That additional limitation also conflicts with the express terms of the Contract. Under Article 33 of the Contract, Arbitrator Dunn had no power to alter or modify the Contract's terms or to impose any limitation or obligation not *explicitly* provided for in the Contract. (Pet. App., 54a). Likewise, under Article 9, Poland Spring's rights were limited only as *expressly* provided in the Contract. (Resp. App., 2a). Thus, by imposing a mitigating circumstances limitation on the Company's right to discharge its employees for insubordination that is not explicitly or expressly provided in the Contract, the Award conflicted with the express terms of the Contract.

Furthermore, the Award deviates from the essence of the Contract because the Arbitrator's justification for creating a mitigating circumstances exception – that the Contract does not prohibit one – is illogical, "unfounded in reason and fact,"

and "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *See Bettencourt v. Boston Edison Co.*, 560 F.2d 1045, 1050 (1st Cir. 1977) (quoting *Safeway Stores v. Am. Bakery & Confectionery Workers*, 390 F.2d 79, 82 (5th Cir. 1968)). The Contract expressly provides that insubordination constitutes just cause for termination. If the parties intended mitigating circumstances to affect whether insubordination constitutes just cause, they would have included that agreement in the Contract. Under the Arbitrator's reasoning in this case, an arbitrator could read into a collective bargaining agreement any term that is not expressly precluded, making all contracts, regardless of how detailed or lengthy, ambiguous and subject to interpretations that the parties never even imagined, let alone agreed upon. For example, under Arbitrator Dunn's logic, it would be impossible for the parties to draft language that allows the Company absolute discretion to discharge insubordinate employees, even if that was their intent. If they chose language providing that an employee can be discharged for insubordination "even in the presence of mitigating circumstances," an arbitrator could still overturn a discharge by noting that the agreement does not allow discharge when there are "*very serious* mitigating circumstances." Accordingly, the Award fails to draw its essence from the Contract because it is completely without rational support and cannot be rationally derived from the terms of the Contract.

Finally, the language of the Award demonstrates that it is based on general considerations of fairness and equity instead of the precise terms of the Contract. The Arbitrator did not rely on the language of the Contract to support his conclusion that the Grievant's insubordination was not just

cause for discharge in this case. To the contrary, he noted the absence of any language authorizing him to consider mitigating circumstances. Instead of depending on the language of the Contract, he weighed the equities, holding that when mitigating circumstances are present, "the culpability of the employee may be diminished, and summary termination may no longer be justified." (Pet. App., 47a). Ultimately, he concluded that "it was unjust for the Company to terminate the grievant for his insubordinate behavior." (Pet. App., 48a). Thus, in purporting to reinstate the Grievant, Arbitrator Dunn dispensed his own version of industrial justice instead of interpreting and applying the language of the Contract. As a result, the First Circuit did not err in finding that the Award fails to draw its essence from the Contract, and certiorari is not warranted in this case.

CONCLUSION

This case does not present compelling reasons for review on certiorari. Accordingly, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

AGREEMENT

between

POLAND SPRING CORPORATION

and

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC LOCAL 1445

Effective: January 1, 1997
Expires: December 31, 2001

Appendix

* * *

ARTICLE 9: MANAGEMENT RIGHTS

Management of the operations and the direction of the workforce, including but not limited to the establishment of operational, safety, health and sanitation rules, the right to hire, promote, transfer personnel and assign work, the right to demote, to discipline, suspend or discharge for just cause, the right to schedule hours and to require reasonable overtime work, the right to relieve employees from duty because of lack of work, and the right to decide the number and location of its operations, the extent to which the locations covered by this Agreement shall operate or be shut down, the right to subcontract out bargaining unit work, the work to be performed, the raw materials, the parts, tools or components to be incorporated therein, the schedule of production, the type of machines or equipment to be used, the methods and standards of quality and quantity of work to be performed, the selling price of products, the methods of selling and distributing products, the personnel required in supervisory, clerical and other positions not included in the bargaining unit, the source of an applicant for employment, and the methods, processes and means of production shall be solely and exclusively vested in the Company subject only to limitations as are expressly provided for in this Agreement. The parties agree that the Company has the right to establish work standards and to maintain the efficiency of employees.

It is also understood that nothing herein shall prevent the Company from transferring, closing out or selling out, in whole or in part, any of its operations, wherever the same

may be located, whenever, in its judgment, it deems such action to serve best its economic interests.

The Company, by not exercising rights reserved to it under the Management Rights clause or by exercising them in a particular way, shall not be deemed to have waived said rights or to have waived the right to exercise them in some other way not in conflict with the terms of this Agreement.

* * * *